88-802 (1)

Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRADFORD AREA SCHOOL DISTRICT, FREDERICK SMITH, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER,** in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY,** in his individual and official capacity as Superintendent of the Bradford Area School District

Petitioners

vs

KATHLEEN STONEKING

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Kenneth D. Chestek
Murphy, Taylor, Trout & Chestek, P.C.
518 State Street
Erie, Pennsylvania 16501
(814) 459-0234

James D. McDonald, Jr.
The McDonald Group
456 West 6th Street
Erie, Pennsylvania 16507
(814) 456-5318

Attorneys for Petitioners

I. QUESTIONS PRESENTED

A. Whether the due process clause of the Fourteenth Amendment places on school districts or its administrators a constitutional duty to protect students from criminal assaults by a teacher, where the district has no knowledge of the criminal activity or the fact that any particular individual is at risk.

B. Whether any such duty was clearly established as a matter of law in 1979 when the Petitioners acted in this case.

II. TABLE OF CONTENTS

I. QUESTIONS PRESENTED i

II. TABLE OF CONTENTS iii

III. TABLE OF AUTHORITITES v

IV. OPINIONS BELOW 1

V. STATEMENT OF JURISDICTION ... 2

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

A. Constitutional Provisions 3

B. Federal Statutes 3

C. State Statutes 4

VII. STATEMENT OF CASE 5

VIII. ARGUMENT 10

A. Summary of argument 10

B. Public school officials have no constitutional duty to protect students from criminal acts by teachers 12

C. The Third Circuit opinion expands liability under § 1983 by abolishing one prong of the prior "special relationship" test. 16

D. A duty to protect ought to be imposed only in the setting of a custodial relationship 18

E. Petitioners are entitled to qualified immunit 20

IX. CONCLUSION 28

X. CERTIFICATION OF MEMBERSHIP 29

XI. PROOF OF SERVICE 30

III. TABLE OF AUTHORITITES

CONSTITUTION

United States Constitution, Amendment 14, Section 1 3

CASES

Bowers vs DeVito, 686 F.2d 616 (7th Cir. 1982) 18

Butz vs Economou, 438 U.S. 478, 504 (1978) 21

Commonwealth Bank and Trust Co. vs Russell, 825 F.2d 12 (3rd Cir. 1987) 15

Davis vs Sherer, 468 U.S. 183 (1984) 21

DeShaney vs Winnebago County, 812 F.2d 298 (7th Cir. 1987), *cert. granted* 108 S. Ct. 1218 (1988) 11, 12, 14-16

Doe vs New York City Department of Social Services, 649 F.2d 134 (2nd Cir. 1981) 24

Doe vs New York City Department of Social Services, 709 F.2d 782 (2nd Cir. 1983) cert. denied 464 U.S. 864 (1983) 24

Estate of Bailey by Oare vs County of York, 768 F.2d 503 (3rd Cir. 1985) 11, 15, 16

Estelle vs Gamble, 429 U.S. 97 (1976) 18

Fox vs Custis, 712 F.2d 84 (4th Cir. 1983) 18

Hall vs Tawney, 621 F.2d 607, 613 (4th Cir. 1980) 24

Harlow vs Fitzgerald, 457 U.S. 800 (1982) 6, 20-22

Hicks vs Feeney, 770 F.2d 375, 380 (3rd Cir. 1985) 23

Ingraham vs Wright, 430 U.S. 651 (1977) 19, 23

Jensen vs Conrad, 747 F.2d 185 (4th Cir. 1984) cert. denied 470 U.S. 1052 (1984) 13-16

Martinez vs California, 444 U.S. 277 (1980) 11, 13, 14, 16-18

Milonas vs Williams, 692 F.2d 931, 942-43 (10th Cir. 1982) *cert. denied*, 460 U.S. 1069 (1983) 24

Mitchell vs Forsyth, 472 U.S. 511 (1985) 2, 6, 8

P.L.C. vs Housing Authority of the County of Warren, 588 F.Supp. 961 (W.D. Pa. 1984) 24

People of Three Mile Island vs Nuclear Regulatory Commissioners, 747 F.2d 139, 145 (3rd Cir. 1984) 22, 23, 26

Pierson vs Ray, 386 U.S. 547 (1967) 23, 26

Scott vs Willis, ___ Pa.Commw. ___, 543 A.2d 165 (1988) 26, 27

Spence vs Staras, 507 F.2d 554, 557 (7th Cir. 1974) 24

White vs Rochford, 592 F.2d 381 (7th Cir. 1979) 19

Williams vs Bennett, 689 F.2d 1370, 1381-82 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) 23

Youngberg vs Romeo, 457 U.S. 307 (1982) 18, 24

STATUTES

24 Pa.C.S.A. §13-1317 . . . . . 4, 20

24 Pa.C.S.A. §13-1327(a) 4, 19

28 U.S.C. §1254 2

28 U.S.C. §1291 . . . . . 2, 8

28 U.S.C. §1983 . . . . . 2, 4, 10, 13, 15-19, 21, 26

IV. OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Third Circuit is reported at 1988 U.S.App. Lexis 12303, and is printed in the Appendix hereto, page 1. The Opinion and Order of the United States District Court for the Western District of Pennsylvania is reported at 667 F.Supp. 1088 (1987) and U.S. Dist. LEXIS 7950, and is printed in the Appendix hereto, page 39.

V. STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254.

The Opinion and Order of the United States Court of Appeals for the Third Circuit was entered on September 12, 1988. App., page 1. A timely Petition for Rehearing was denied on October 5, 1988. App., p. 33. On October 14, 1988, the United States Court of Appeals for the Third Circuit issued an Order staying the issuance of the mandate in the instant appeal pending this petition to the Supreme Court of the United States for Writ of Certiorari. App., page 35.

Jurisdiction for the appeal to the United States Court of Appeals for the Third Circuit was based upon 28 U.S.C. §1291. The appeal to the United States Court of Appeals for the Third Circuit was made in accord with *Mitchell vs Forsyth*, 472 U.S. 511 (1985), which holds that a denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. §1291.

Jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked by Plaintiff based upon 28 U.S.C. §1983.

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following are the constitutional provisions and statutes involved in this appeal:

A. Constitutional Provisions

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States under the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14, Section 1.

B. Federal Statutes

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit and equity, or other proper proceeding for regress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983

C. State Statutes

24 Pa.C.S.A. §13-1317 is set forth in the Appendix, page 119.

24 Pa.C.S.A. §13-1327(a) is set forth in the Appendix, page 123.

VII. STATEMENT OF CASE

This is an appeal of an Order of the United States Court of Appeals for the Third Circuit, Case No. 87-3637, affirming the Order of the United States District Court for the Western District of Pennsylvania, Case No. 87-63E, which denied the Motion of Petitioners Frederick Smith, Richard Miller and Frederick Shuey for Summary Judgment that they are immune from suit on the allegations of this case. Opinion and Order, App., p. 24. This action commenced with the filing of a Complaint by Plaintiff-Respondent, Kathleen Stoneking ("Respondent" or "Stoneking"), in the United States District Court for the Western District of Pennsylvania, Erie Division, on March 24, 1987. Complaint, App., p. 85.

The facts material to the consideration of the questions presented are as follows. The Bradford Area School District (the "School District"), which is not a party to this appeal, is a local governmental agency organized pursuant to the laws of the Commonwealth of Pennsylvania. During the relevant period of time, Petitioner, Frederick Smith ("Smith"), was the principal of the Bradford Area High School; Petitioner Richard Miller ("Miller"), was the assistant principal; and Petitioner Frederick Shuey ("Shuey"), was the superintendent of the School District.

Respondent Kathleen Stoneking ("Stoneking") attended and graduated from the Bradford Area High School in 1983.

Since the question of whether officials are immune from trial is based upon a strictly objective test, *Harlow vs Fitzgerald*, 457 U.S. 800 (1982), the salient facts can be drawn entirely from the pleadings.[1]

Respondent contends in her Complaint that the Petitioners received information in 1979 that the former band director of the Bradford Area High School, Edward Wright, had attempted to sexually molest a female band member. Complaint, par. 11, App., p. 89. Respondent also alleges that Petitioners began maintaining a file on Wright and that they instructed him not to place himself in one-on-one situations with female students. Complaint, pars. 13, 14 and 15, App., pp. 89-90. She alleges that, subsequent to the alleged molestation of the other band member in 1979, Wright began to sexually abuse and/or molest her, both on and off of school property. Complaint, paragraphs 23 and 24, App., pp. 91-92. Wright's misconduct was exposed in March of 1986. His written resignation was received and accepted by the School District on March 14, 1986, effective immediately. Complaint, paragraph 26, App., p. 92. Wright subsequently pleaded guilty to numerous criminal charges.

On August 7, 1987, Petitioners filed a Motion for Summary Judgment, contending that:

1.) Respondent's claims prior to March 24,

---

[1]*Cf. Mitchell vs Forsyth*, 472 U.S. 511, (1985), in which the Court holds that, in a proper case, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* at 517.

1985 were barred by the applicable statute of limitations;

2.) The School District had no constitutional duty to protect her for any incidents after the date she graduated from school;

3.) Respondent alleged no actionable violation of her civil rights; and

4.) Petitioners Smith, Miller, and Shuey were shielded from liability by the defense of qualified immunity.

Respondent filed a Brief in Opposition.

The District Court issued its Opinion and Order on August 28, 1987. The District Court held, *inter alia*, that there were genuine issues of material fact pertaining to the statute of limitations; that Respondent had alleged a violation of a right protected by the substantive component of the due process clause; and that Petitioners Smith, Miller, and Shuey were not shielded from liability by the defense of qualified immunity.

On September 22, 1987, upon a motion by Petitioners, the District Court amended its Order to indicate that its decision on the statute of limitations involved "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the [August 28] Order may materially advance the ultimate termination of the litigation."

On September 25, 1987, Petitioners filed a Petition

for Permission to Appeal that portion of the District Court's Order as it related to the application of the statute of limitations to this case. On October 21, 1987, the United States Court of Appeals for the Third Circuit denied the petition. App., p. 81.

Petitioners filed their Notice of Appeal on September 24, 1987, from the District Court's Order as it relates to the issue of qualified immunity.[2]

The United States Court of Appeals for the Third Circuit issued its opinion and order denying Petitioners appeal on September 12, 1988. Opinion and Order, App., p. 24. The majority of the divided panel held that Petitioners were not entitled to the defense of qualified immunity, stating that clearly established law existed in 1979, establishing a special relationship between public school administrators and students, which gave rise to a duty to protect Respondent from harm by a third party, Wright. App., pp. 21-23.

The honorable Judge Stapleton, in his dissenting opinion, would have held the opposite. He correctly stated that "neither [the United states Court of Appeals for the Third Circuit] nor any other federal court of appeals has held . . . that a special relationship exists between a school administrator and students within his or her jurisdiction." Opinion, App., p. 26. Judge Stapleton further noted that

---

[2]A denial of a claim of qualified immunity is an appealable final order within the meaning of 28 U.S.C. § 1291. *Mitchell vs Forsyth, supra.*, 472 U.S. 511.

the majority opinion and judgment marked an expansion of prior law which Petitioners could not have been expected to know. Opinion, App., pp. 28-29.

A timely Petition for Rehearing was denied on October 5, 1988. The Court on October 14, 1988 issued an Order staying the issuance of the mandate in the instant appeal pending this petition to the Supreme Court of the United States for Writ of Certiorari. App., p. 35.

VIII. ARGUMENT

A. Summary of argument

The Third Circuit's holding in this case marks a vast and unwarranted expansion of civil liability under § 1983. The Court, in its ruling, goes far beyond previous law, contradicting not only its own prior rulings but those of this and other Courts as well.

It must be remembered that the Court below was faced only with the narrow issue of whether these school officials were entitled to qualified immunity for actions they took (or allegedly failed to take) in 1979. As discussed in more detail below, governmental officials can be found liable only when they knew or should have known that their conduct violated some "clearly established" constitutional rights of the plaintiff.[3]

Before the Court could determine whether the alleged right was "clearly established," however, it first had to determine whether such a right exists at all. The Court below found for the first time that a school district does have an affirmative duty, arising out of the Fourteenth Amendment, to protect high school students from sexual abuse by teachers. The Court then found that this newly-created duty was "clearly established" in 1979 when these officials acted.

---

[3]*See* discussion at pp. 20-27, *infra*.

This holding, however, must be carefully scrutinized in light of the fact that the majority relied heavily upon its prior opinion in the case of *Estate of Bailey by Oare vs County of York*, 768 F.2d 503 (3rd Cir. 1985). That opinion is directly contrary to a decision on identical facts by the Seventh Circuit, a decision now under review by this Court. *DeShaney vs Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted* 108 S. Ct. 1218 (1988). Moreover, the Third Circuit's finding of potential liability in this case seems to be directly contrary to this Court's own rationale in *Martinez vs California*, 444 U.S. 277 (1980).

Petitioners thus contend that the Circuit Court erred in (a) finding that such a constitutional duty exists in the first instance, and (b) further erred in holding that such a duty was "clearly established" at the time Respondents acted. These errors are so egregious that this Court ought to grant certiorari and examine for itself the far-reaching implications of the holding of the Court below.

The finding of the Court below that a duty exists, guaranteed by the due process clause, to protect persons at liberty from harm, is an essential part of its more narrow ruling on the sole issue before it (that of qualified immunity). The broad implications of this ruling thus require review by this Court.

Since the Third Circuit began its analysis by examining the nature of the alleged constitutional right, we shall begin our analysis there as well.

B. Public school officials have no constitutional duty to protect students from criminal acts by teachers

It must be noted at the outset that Stoneking is not claiming that Smith, Miller and Shuey actually abused her or touched her in any way. Stoneking asserts only that she has a right to be free from sexual molestation, and that Smith, Miller and Shuey had a duty to protect her from this alleged molestation.[4]

The issue of whether governmental officials have a constitutional duty to protect individuals at liberty from criminal acts of third persons is presently before this Court. In *DeShaney vs Winnebago County*, 812 F.2d 298 (7th Cir. 1987), *cert. granted* 108 S. Ct. 1218 (1988), *pending at* No. 87-154,[5] this Honorable Court has been asked to determine whether a child enjoys a constitutionally-protected right under the Fourteenth Amendment to protection from abusive parents.

The question of the state's duty to protect individuals at liberty from criminal acts of third persons has been a subject of controversy in the Courts of Appeals since

---

[4]The gravamen of Stoneking's Complaint is that she had a right to be free from sexual assault by a teacher of the Bradford Area School District. Of course, for every right there exists a correlative duty; thus, Stoneking alleges in essence that the District and Smith, Miller and Shuey had a duty to prevent the alleged assaults against her by Wright.

[5]Argument was conducted before this Court in *DeShaney* on November 2, 1988.

this Court's decision in *Martinez vs California*, 444 U.S. 277 (1980). In *Martinez*, a mentally disturbed sex offender was paroled after five years of a one to twenty year term. It was conceded that the parolee was a known risk when he was released. Subsequent to his release he killed a fifteen year old girl. An action was brought under § 1983 to recover for the loss sustained as a result of the girl's murder. This Court held that the actions of the parolee were too remote to be considered a proximate cause of the parole board's actions in releasing the parolee, and therefore denied plaintiff's cause of action under § 1983. This Court left open, however, the possibility that liability may be found in future cases. *Id.*, 444 U.S. at 285.

Since *Martinez*, the Courts of Appeals have struggled to define the circumstances under which an affirmative duty to protect will be imposed upon government officials. Some Courts have imposed such a duty when they find that a "special relationship" exists between the state and the individual seeking protection.

For example, in *Jensen vs Conrad*, 747 F.2d 185, (4th Cir. 1984), *cert. denied* 470 U.S. 1052 (1984) the estates of six children who died as the result of brutal beatings inflicted by their guardians sued the children's services agencies which had handled their cases. In each case the child involved had been the subject of an investigation by social workers charged under state law with the obligation to investigate cases of child abuse and take steps necessary to prevent similar abuse from occurring. Causes of action were alleged under § 1983 based upon a purported viola-

tion of the children's Fourteenth Amendment rights resulting from the failure of the social service agencies and employees to intervene and provide the protection necessary to prevent the harm which occurred.

The United State Court of Appeals for the Fourth Circuit reviewed the case law which had developed nationwide on the issue of an affirmative duty arising out of a special relationship to provide protection against deprivation of constitutional rights. The Court identified three factors which it concluded had been persuasive in finding special relationships in the cases reviewed. These include (1) whether the victim or the perpetrator was in legal custody at the time of or prior to the incident; (2) whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and (3) whether the state knew of the victim's particular plight. *Id.*, 747 F.2d at 194-195, n. 11.

Some courts have declined to follow the "special relationship" test, analyzing such cases instead strictly in terms of causation, as this Court did in *Martinez*. For example, the Seventh Circuit has eschewed the notion of a "special relationship" outside of pure custodial relationships such as a prison setting. In *DeShaney, supra* the Seventh Circuit held that a county children's services agency was not liable for serious injuries suffered by a child at the hands of his abusive father even though the agency had received a prior allegation that the child was being abused. That Court held that, while the actions of the county arguably did not help the abused child, they

certainly did not harm him or cause his injuries to be more likely to occur, and therefore as a matter of law the county was not liable.[6]

The United States Court of Appeals for the Third Circuit, contrary to the Seventh Circuit, has fully embraced the "special relationship" test outlined by the Fourth Circuit in *Jensen*. In *Estate of Bailey by Oare vs County of York*, 768 F.2d 503 (3rd Cir. 1985), discussing *Jensen*, a divided panel of the Third Circuit suggested that it would be appropriate to find a "special relationship" if the Jensen three-prong test was met. *Estate of Bailey*, 768 F.2d at 509.[7] The Court went on to hold that a county children's services agency could be held accountable under § 1983 for injuries sustained by a minor child at the hand of an

---

[6]The Seventh Circuit found that the agency was not liable to the plaintiff, because it was not the cause of the harm. The Court stated

> It is unlikely that [the social worker's] well intentioned but ineffectual intervention did [the infant victim] any good at all, but it is unlikely that she did him any harm. She merely failed to protect him from his bestial father.

DeShaney, Id., p.302. The Court in *DeShaney* refused to adopt the special relationship doctrine as set forth in the Third Circuit's decision of *Estate of Bailey, supra.*

[7]The United States Court of Appeals for the Third Circuit recently reaffirmed its approval of the *Jensen* three-step analysis. In *Commonwealth Bank and Trust Co. vs Russell*, 825 F.2d 12 (3rd Cir. 1987), the Third Circuit applied the *Jensen* test without expressly saying so. On page 16 of its decision, the Third Circuit distinguishes *Commonwealth Bank* from *Estate of Bailey, supra*, on the basis that *Commonwealth Bank* case flunks the third prong of the three *Jensen* tests (i.e., whether the state knew of any particular threat to plaintiff's decedents).

abusive parent.

The opinion of the Third Circuit in this case extends the boundaries of this "special relationship" concept even farther. As discussed in more detail at pp. 16-18 below, the Court below has virtually abolished one of the prongs of the three-part test announced in *Jensen, supra.*

It should be pointed out that the operative facts of *Estate of Bailey* are identical to those of *DeShaney.* Should this Court affirm the Seventh Circuit in *DeShaney,* it will almost of necessity overrule the Third Circuit's holding in *Estate of Bailey.* Since both the District Court and the Third Circuit relied heavily on *Estate of Bailey* in their holdings in this case, an affirmance in *DeShaney* will almost certainly necessitate a reversal in this case.

C. The Third Circuit opinion expands liability under § 1983 by abolishing one prong of the prior "special relationship" test.

By finding a "special relationship" in this case, the Third Circuit further expanded liability under § 1983. No other Circuit Court has found that a special relationship can exist unless the public body has prior knowledge of the identity of the victim and the victim's particular plight. This requirement is taken directly from this Court's hold-

ing in *Martinez, supra.*[8]

In its Opinion, the Third Circuit moved well beyond that requirement by finding that public school officials have a constitutional duty to protect students from criminal acts by teachers, even when there is no notice that a particular, identified student is in peril. Opinion, App., p. 17.[9]

It is uncontroverted that Petitioners had no knowledge of Stoneking's particular plight. However, the Third Circuit Opinion would ignore this well accepted requirement, and would deny immunity to defendants. The Third Circuit, in fact, found that the school officials were on notice that "female band members faced a 'special danger'" from Wright. Opinion, App., p. 21. Thus, instead of accepting as a threshold requirement that public school officials must have particular knowledge of an identifiable student and that student's particular plight, the Third Circuit would establish a duty to protect a broad class of unidentified persons. Petitioners submit that this holding of the Third Circuit is a significant and unwarranted

---

[8]In *Martinez*, this Court held that the § 1983 claimants failed to state a cause of action against the California parole board, because "the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger." *Martinez, supra.*, 444 U.S. 277 at 286.

[9]Judge Stapleton correctly noted in his dissenting Opinion that "[a] school teacher, school administrator, or anyone else acting under the color of state law clearly violates the constitution if he or she sexually abuses a student. That principle is not helpful here, however, because this suit does not involve a claim against Wright." Opinion, App., p. 25.

expansion of liability under 42 U.S.C. § 1983.

More significantly, however, this holding conflicts with this Court's holding in *Martinez, supra.*. Respondent, who was not in any sense of the word in the "custody" of the school district at the time of the alleged assault, falls within the category of "public at large" to whom no special duty is owed under the holding of *Martinez*. 444 U.S. at 286. This is because the state did not select her out of the public at large and place her at risk. *See Fox vs Custis*, 712 F.2d 84 (4th Cir. 1983); *Bowers vs DeVito*, 686 F.2d 616 (7th Cir. 1982).

D. A duty to protect ought to be imposed only in the setting of a custodial relationship

This Court and the Circuit Courts have imposed an affirmative duty upon government officials to protect individuals only in very limited circumstances. Generally, an affirmative duty to protect individuals will be imposed only where the state has selected a person from the public at large and placed him in a position of peril. *See, e.g., Estelle vs Gamble*, 429 U.S. 97 (1976), (state officials are under a duty to provide medical care to those held in custody of prison officials); *Youngberg vs Romeo*, 457 U.S. 307 (1982) (caretakers of individuals committed to a mental institution have an affirmative duty to provide that level of care and training necessary to protect the safety of the mentally retarded individual); *cf. White vs Rochford*,

592 F.2d 381 (7th Cir. 1979) (where police officers abandoned minors in car on highway after making a traffic arrest of the adult driver, state placed the minors at peril and was subject to liability under § 1983). This is appropriate since, in those situations, the person in custody is dependent upon the state for his physical well-being. In no instance, however, has this Court or any other Circuit Court imposed a duty upon school districts and its officials to protect students, who are at liberty.

In the instant case, however, there can be no special relationship, as Stoneking was not in the "custody" of school officials at the times of the alleged assaults.[10] The Third Circuit noted that Pennsylvania's mandatory attendance law, 24 Pa.C.S.A. § 13-1327 (a), does not provide public school administrators with legal custody of their students. Opinion, App., p. 18. Further, the *in loco*

---

[10]This Court has recognized this in *Ingraham vs Wright, supra.*, 430 U.S. 651, where it noted:

> [T]he public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.
>
> The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.

Id., 430 U.S. at 670.

parentis doctrine, adopted by the Commonwealth of Pennsylvania and codified at 24 Pa.C.S.A. § 13-1317, establishes only limited rights of administrators over students, but does not establish any affirmative duties owed to students by administrators.

E. Petitioners are entitled to qualified immunity

The holding of the Third Circuit in the case at bar is particularly egregious in that, after finding for the first time that this affirmative constitutional duty to protect students exists, it then declares that the Petitioners are not immune from suit. This it can only do if the constitutional rights which were purportedly violated were "clearly established" at the time Petitioners acted. It is respectfully submitted that constitutional rights which are declared for the first time in 1988 were not clearly established in 1979.[11]

This Court established the current standards governing qualified immunity in *Harlow vs Fitzgerald*, 457 U.S.

---

[11]The relevant date of the inquiry is 1979, since this is the first alleged notice to the school district of any problem with Wright. Complaint, Pars. 11, 13, App., p. 89. Stoneking herself was a member of the band in 1979. Although the alleged conduct of Wright extended beyond Stoneking's graduation in 1983, Complaint, Pars. 22, 24, 25, App., pp. 91-92, there are no allegations of further notices of any improper contacts between Wright and any student until well after Stoneking's graduation.

800 (1982).[12] In *Harlow*, this Court stated:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. As this Court determined in *Davis vs Sherer*, 468 U.S. 183 (1984), no other inquiry is relevant.

From the foregoing formulation, the following analysis must be undertaken to determine whether a claim of qualified immunity is properly taken:

1. Is the claim asserted by governmental officials performing discretionary functions?

2. Does Plaintiff have a clearly established statutory or constitutional right which is threatened by the aforementioned exercise of discretion?

3. Should a reasonable person expect that his conduct in exercise of his discretion would violate that right?

The first step of the analysis outlined above cannot be seriously disputed. Public school officials are certainly

---

[12] *Harlow* was a suit against federal, not state, officials, but as this Court stated in deciding the case, it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." 457 U.S. at 818, n.30 (quoting *Butz vs Economou*, 438 U.S. 478, 504 (1978).

governmental officials, and the actions taken by them with respect to investigation of allegations of teacher misconduct, as well as their responses to the results of that investigation, are highly discretionary in nature. Thus, Smith, Miller and Shuey are entitled to assert the defense.

The second prong of this three part analysis is not met. In the instant case, neither the district nor Petitioners owed Stoneking any constitutional duty to protect her from assaults by Wright. *See* pp. 12-16, above. This means immunity is properly invoked.

Finally, even if the Court could find that such a constitutional duty exists, these officials are still immune since they satisfy the requirements of the the third prong; that is, they could not reasonably be expected in 1979 to have known that a contitutional right to protection would be announced in 1988.

In *Harlow vs Fitzgerald, supra*, this Court expressly declined to set forth the criteria for determining whether a right (and, Petitioners submit, a corresponding duty) is "clearly established". 457 U.S. at 118, n.32. However, the Third Circuit, in *People of Three Mile Island vs Nuclear Regulatory Commissioners*, 747 F.2d 139, 145 (3rd Cir. 1984), adopted an approach that requires officials to apply general, well-developed legal principles. 747 F.2d at 144. This approach requires some -- but not precise -- factual correspondence between applicable legal precedents and the case at issue. *Id.* at 145. Officials are therefore required to relate established legal principles set forth in previous cases to analogous factual situations. *Id.* at 144,

citing *Williams vs Bennett*, 689 F.2d 1370, 1381-82 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). It does not, however, require lay public officials to "predic[t] the future course of constitutional law." *People of Three Mile Island*, 747 F.2d at 144, quoting *Pierson vs Ray*, 386 U.S. 547 (1967).

The question becomes, then, one of identifying legal principles governing analogous factual situations at the time the alleged violation occurred, and, if any existed, whether the official should have related this established law to the situation before them. *Hicks vs Feeney*, 770 F.2d 375, 380 (3rd Cir. 1985). Hence, a review of the law as it existed in 1979 must be undertaken.[13]

The Third Circuit relied on a number of cases in determining whether or not clearly established law imposed a constitutional duty upon Petitioners to protect Stoneking. Opinion and Order, App., pp. 15-17. As noted by Judge Stapleton in his dissent, however, no law existed in 1979 from which a "constitutional duty to investigate" is readily apparent. Opinion, App., p. 25.

Indeed, the cases upon which the Third Circuit and the trial court primarily relied involved procedural due process claims under which high school students were entitled to freedom from arbitrary punishment and disciplinary procedures, or cases involving alleged abuse of dependent persons in state institutions. See *Ingraham vs*

---

[13]*See* note 11, *supra*.

Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (corporal punishment of public schools implicates a constitutionally protected liberty interest); *Milonas vs Williams*, 692 F.2d 931, 942-43 (10th Cir. 1982) *cert. denied*, 460 U.S. 1069 (1983) (due process rights of children in quasi-juvenile detention facility violated by certain physically abusive disciplinary practices); *Hall vs Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (liberty interest recognized rendering unlawful arbitrary corporal punishment of school student); *Youngberg vs Romeo*, 457 U.S. 307, 315-16 (1982) (constitutionally protected liberty interest found for persons confined in mental institution); *Spence vs Staras*, 507 F.2d 554, 557 (7th Cir. 1974) (constitutional right of persons confined in mental hospital to be free from assault by other patients). None of these cases clearly establish a duty for high school administrators to protect unknown students from criminal activity by a teacher.

The other cases cited by the Third Circuit are equally inapplicable to the proposition that the law was "clearly established" in 1979 that school district administrators had a constitutional duty to investigate whether or not a school teacher was sexually abusing a student. In *Doe vs New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981) and *Doe vs New York City Department of Social Services*, 709 F.2d 782 (2nd Cir. 1983), *cert. denied* 464 U.S. 864 (1983) there is no discussion involving a substantive constitutional right. And, *P.L.C. vs Housing Authority of the County of Warren*, 588 F.Supp. 961 (W.D. Pa. 1984), along with the previous cited authority, was decided subse-

quent to 1979.

Indeed, the instant case is a far cry from situations involving a clearly established and well litigated general proposition in which the case at hand merely presents the new factual wrinkle. Petitioners in 1979 had not previously encountered, nor were they aware of any cases, involving situations remotely parallel to the incidents which are the subject of this lawsuit. Whether there existed any constitutional requirement to protect female students from sexual abuse was an open question at all times relevant hereto.

As Justice Stapleton noted in his dissent,

> Neither this court nor any other federal court of appeals has held, however, that a special relationship exists between a school administrator and students within his or her jurisdiction.
>
> The court's argument for finding a special relationship is quite properly based on analogy. The analogies employed, however, are not sufficiently close to the situation before us to make the court's conclusion "readily apparent" to reasonable school administrators. While school attendance is mandatory, for example, the relationship between a superintendent of a public school district and high school students within the district is clearly distinguishable from that between a social worker and her five-year

> old ward or that between a jailer and his incarcerated charge.

Id., App., pp. 26-27.

The holding of the Third Circuit in the instant case has required the public school administrators to "predict the future course of constitutional law", contrary to its own holding in *People of Three Mile Island, supra*, 747 F.2d at 144, quoting *Pierson vs Ray*, 386 U.S. 547 (1967). Indeed, had these public school administrators in this case been able to "predict the future course of constitutional law," they would have concluded that there was in fact *no* constitutional duty to protect students from sexual abuse by teachers.

Before the Third Circuit decided the instant appeal, the Pennsylvania Commonwealth Court ruled squarely that no such duty exists. In *Scott vs Willis*, ___ Pa.Commw. ___, 543 A.2d 165 (1988), two students who had been sexually assaulted by a teacher on school property brought suit against the school district and its officials, alleging a violation of their constitutional rights and seeking relief under § 1983. The Pennsylvania Commonwealth Court sustained a demurrer to the § 1983 claim, holding expressly that there was no special relationship between the school district and the plaintiffs, and that therefore there was no constitutional duty to protect those students.

It should be noted that the relationship between a Pennsylvania public school and its students is created under state law, and that school administrators are bound

by state laws and state courts just as much as by federal laws and federal courts. How can it be said that there is clearly established law that a special relationship exists between public school administrators and their students, when the state courts, on identical facts, have found that no such relationship or duty exists?

Scott vs Willis is indistinguishable from, and irreconcilable with, the decision of the Third Circuit and the trial court. These lay public school administrators should not be put in a position of having to decide whether the state court decision or the federal court decision is correct.

IX. CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.

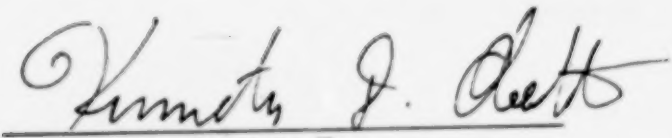
Kenneth D. Chestek, Esq.
MURPHY, TAYLOR, TROUT & CHESTEK, P.C.
518 State Street
Erie, PA 16501
(814) 459-0234

James D. McDonald, Jr., Esq.
THE MCDONALD GROUP
456 West 6th Street
Erie, PA 16507
(814) 456-5318

Attorneys for Petitioners

X. CERTIFICATION OF MEMBERSHIP

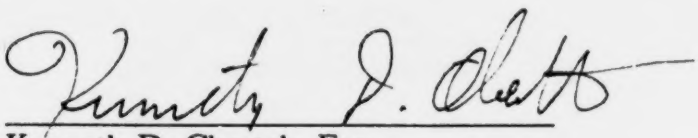
It is hereby certified that both Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



Kenneth D. Chestek, Esq.

XI. PROOF OF SERVICE

I hereby certify that three copies of the within Petition for Writ of Certiorari were served on Deborah W. Babcox, Esq., 222 West Washington Street, Bradford, PA 16701 and Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 10th day of November, 1988.



Kenneth D. Chestek, Esq.